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IN THE
COURT OF APPEALS OF INDIANA

FRANK C. BIEDERSTADT,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0601-PC-2
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-9208-CF-110982

January 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Frank Biederstadt appeals the denial of his petition for post-conviction relief, which challenged his 1993 conviction for murder. We affirm.

Issue

We combine and restate the issues before us as whether the post-conviction court properly concluded that Biederstadt received the effective assistance of counsel.

Facts

On direct appeal from Biederstadt's conviction, we described the underlying facts of this case as follows:

> Viewed most favorably to the State, the evidence shows that on August 21, 1992, Biederstadt, Herb Buchanan, Cleo Luper, and others were at the wooded encampment of James Hawkins, a homeless man. The men were drinking alcohol and playing cards. Luper and Buchanan got into an argument and a scuffle ensued. Luper hit Buchanan in the face three times with his fist and Hawkins also became involved, stabbing Buchanan in the throat with a knife.
>
> During the fight, Buchanan was either dragged or fell into the ashes of the campfire. Luper noticed that Buchanan's clothes were about to catch fire and yelled at the others to pull Buchanan out of the fire. Hawkins pulled Buchanan from the fire and noticed that he was breathing heavily. Biederstadt stated, "We've got to kill him, or he'll snitch." Biederstadt then picked up a cement block and struck Buchanan repeatedly on the head with it. As Biederstadt struck Buchanan, he yelled, "Die, you S.O.B."
>
> Hawkins and Luper fled the scene and Hawkins found a police officer, to whom he reported the incident. Hawkins and Luper both identified Biederstadt from a photo array as the man who killed Buchanan. The autopsy revealed that while the stab wound to Buchanan's throat was serious, he could have survived that injury. However, he could not survive the blows to the head which shattered his skull.

Biederstadt v. State, No. 49A05-9311-CR-403, slip op. pp. 2-3 (Ind. Ct. App. May 26, 1995).

The State charged Biederstadt with one count of murder. A jury found him guilty as charged, and the trial court sentenced him to forty years. Trial counsel filed a motion to correct error, asserting the existence of newly discovered evidence, coming from a witness named James McIntosh, that Luper and another individual, Joe Navarro, had each struck Buchanan with a cement block. The trial court denied the motion to correct error. On direct appeal, appellate counsel argued that the trial court improperly denied the motion to correct error and that there was insufficient evidence to support Biederstadt's conviction. We rejected both arguments and affirmed the conviction. No petition for transfer to our supreme court was filed.

On July 5, 2001, Biederstadt filed a petition for post-conviction relief ("PCR petition"). The State Public Defender's office initially made an appearance on Biederstadt's behalf, but later withdrew its representation. Biederstadt continued litigation of the PCR petition pro se. He alleged that he received ineffective assistance of trial and appellate counsel in several particulars. After conducting a hearing, the post-conviction court denied Biederstadt's PCR petition on October 31, 2005. The court also denied Biederstadt's motion to correct error, and he now appeals.

Analysis

When reviewing the judgment of a post-conviction court, we consider only the evidence and reasonable inferences supporting its judgment. Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006). "The post-conviction court is the sole judge of the evidence and

the credibility of the witnesses." Id. at 468-69. "To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court." Id. at 469. Where, as here, the post-conviction court enters findings and conclusions in accordance with Indiana Post-Conviction Rule (1)(6), we will reverse only upon a showing of clear error, which only occurs if we are left with a definite and firm conviction that a mistake has been made. Id. "Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, will its findings or conclusions be disturbed as being contrary to law." Id.

Claims of ineffective assistance of counsel are reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). A defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Id. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). A reasonable probability arises if confidence in the outcome of the trial is undermined. Id.

"We presume that counsel provided adequate assistance and defer to counsel's strategic and tactical decisions." Terry v. State, 857 N.E.2d 396, 403 (Ind. Ct. App.

2006). Whether a lawyer performed reasonably under the circumstances is determined by examining the whole of the lawyer's work on a case. Oliver v. State, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), trans. denied. "A defendant must offer strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense." Id. "The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors and bad tactics do not necessarily mean that representation was ineffective." Grinstead, 845 N.E.2d at 1036.

A. Voluntary Manslaughter Instruction

The first ineffectiveness issue we address is whether trial counsel should have requested that the trial court give a jury instruction regarding voluntary manslaughter as a lesser-included offense of murder. Specifically, Biederstadt contends there was evidence presented in this case that he acted under strong provocation and in sudden heat when he killed Buchanan. At trial, there was some evidence presented that Biederstadt and Buchanan might have gotten into an argument over alcohol and the card game, which escalated into physical violence.[1]

"Voluntary manslaughter is an inherently included lesser offense of murder." Washington v. State, 808 N.E.2d 617, 625 (Ind. 2004). The existence of sudden heat reduces the crime of murder to voluntary manslaughter. Conner v. State, 829 N.E.2d 21,

[1] During the PCR hearing, Biederstadt testified regarding alleged provocation by Buchanan in more detail. That evidence, however, was not presented during trial because Biederstadt did not testify and, therefore, is not relevant in determining the appropriateness of requesting or giving a voluntary manslaughter instruction, which necessarily is gauged by the evidence actually presented during trial. Furthermore, on appeal Biederstadt does not challenge the post-conviction court's conclusion that trial counsel's advice to Biederstadt not to testify at trial "was a strategic and wise one. [Biederstadt's] statement at the evidentiary hearing corroborated his guilty verdict." App. p. 203.

24 (Ind. 2005). "Sudden heat occurs when a defendant is provoked by anger, rage, resentment, or terror, to a degree sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection." Id. It has been held on many occasions, "Any appreciable evidence of sudden heat justifies an instruction on voluntary manslaughter." Washington, 808 N.E.2d at 626.

However, whether the trial court would have given a voluntary manslaughter instruction in this case had one been requested is a different question from whether it constituted ineffective assistance not to request one in the first place. In that respect, our supreme court has expressly stated, "a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense." Autrey v. State, 700 N.E.2d 1140, 1141 (Ind. 1998). In Autrey, the court held that trial counsel was not ineffective for failing to request lesser-included offense instructions on a charge of murder because it represented a reasonable "all or nothing" tactical choice by defense counsel to obtain a full acquittal for the defendant by placing the blame for the victim's death on another person and highlighting the "discordant" testimony of the witnesses. Id. at 1141-42. See also Sarwacinski v. State, 564 N.E.2d 950, 951 (Ind. Ct. App. 1991) (holding that it was not ineffective assistance not to request voluntary manslaughter instruction on a murder charge because it might have undermined defense of self-defense and/or lessened chance of the defendant's acquittal).

At the time of Biederstadt's PCR hearing, which occurred approximately twelve years after trial, trial counsel could not remember why he had not requested a voluntary manslaughter instruction. Biederstadt's recollection was that such an instruction had been requested at one point, but later withdrawn by trial counsel. Trial counsel did state at one point during the hearing, "I should have offered that"–i.e., a voluntary manslaughter instruction. Tr. p. 19.

Nevertheless, we review counsel's trial performance for objective reasonableness. See Grinstead, 845 N.E.2d at 1031. Thus, trial counsel's subjective second-guessing of his decisions twelve years after trial is not dispositive on the question of whether he provided Biederstadt with effective assistance of counsel. After reviewing the trial record, in particular the opening and closing arguments of trial counsel, it is clear that trial counsel chose an "all or nothing" strategy in defending Biederstadt. He focused on discrepancies in the testimony of the State's witnesses, both in their trial testimony and inconsistencies between that testimony and pretrial statements. He also highlighted the motivation of the witnesses to implicate Biederstadt in Buchanan's death and possibly give false testimony; one of those witnesses pled guilty to aggravated battery instead of murder immediately before Biederstadt's trial, and another was never charged with any crime in connection with Buchanan's death. Moreover, the evidence of sudden heat or provocation presented at trial–a fight over alcohol and/or a card game–was weak. This case is very similar to Autrey, in that it clearly was a reasonable strategy to attempt to completely absolve Biederstadt of responsibility for Buchanan's death by highlighting the "discordant" testimony of the State's witnesses. We will not second-guess that

strategy after-the-fact simply because the jury convicted Biederstadt of murder. See Autrey, 700 N.E.2d at 1142. Counsel's performance was not rendered deficient by his failure to request a voluntary manslaughter instruction.[2]

B. Admission of Crime Scene Videotape

Next, we address Biederstadt's contention that trial counsel should have objected to the State playing a videotape of the crime scene taken by the police. During trial, the State initially introduced six photographs of the crime scene. Later, the State apparently sought to introduce both more crime scene photographs and a videotape of the crime scene. The trial court interrupted and stated,

> You have to make an election, because those guys go hog wild. They shoot hundreds and hundreds of pictures, then we show all of the pictures, and then they want to show us videos . . . . I would suggest, in the interest of time, you decide what is more beneficial to you, the videos or the photos.

App. pp. 635-36. The State chose to play the videotape, and Biederstadt's trial counsel did not object.

Although Biederstadt claims trial counsel should have objected to the videotape, he fails to present a cogent argument as to what the basis for such an objection would have been. It appears he believes the videotape was cumulative of the six photographs of the crime scene that had already been admitted and that the tape was very gruesome and

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[2] In support of his argument that trial counsel was ineffective for not requesting a voluntary manslaughter instruction, he quotes the following from Justice Brennan: "[I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction." Keeble v. United States, 412 U.S. 205, 212, 93 S. Ct. 1993, 1997 (1973). In Keeble, the issue was whether the trial court had erred in refusing to give a lesser-included offense instruction that had been requested by defense counsel. Keeble, therefore, does not govern whether a defense attorney must request a lesser-included offense instruction where the evidence might support it.

disturbing. As an initial matter, we note that the admission of cumulative evidence generally is not a basis for a new trial. Helsley v. State, 809 N.E.2d 292, 296 (Ind. 2004). As a logical matter, it also follows that failing to object to cumulative evidence would not constitute ineffective assistance of counsel.

As for the alleged gruesomeness of the videotape, even gory and gruesome photographic evidence is admissible as long as it is relevant to some material issue or shows a scene that a witness could describe orally. Id. Biederstadt fails to explain why photographic evidence in the form of a videotape of the crime scene was not relevant to a material issue in this case. In fact, in Helsey our supreme court held that it did not constitute reversible error to show both a videotape of a murder scene depicting the victims and still photographs depicting the same scene. Id. If such repeated showing of a murder scene did not constitute reversible error in Helsey, where an apparent trial objection was made, Biederstadt has not demonstrated that trial counsel was ineffective for not objecting to the crime scene videotape in this case.

Biederstadt also claims the post-conviction court erred in refusing to allow him to introduce a newspaper article purportedly reporting that when the crime scene videotape was shown, some in the courtroom audience, particularly members of Buchanan's family, became visibly upset and even left the courtroom. We will review the post-conviction court's decision regarding the admission of evidence for an abuse of discretion and with reference to the Indiana Rules of Evidence. See Rondon v. State, 711 N.E.2d 506, 516 (Ind. 1999) (citing Ind. Post-Conviction Rule 1(5) and Ind. Evidence Rule 403)); see also Evid. R. 101 (stating that Evidence Rules generally apply

"in all proceedings in the courts of the State of Indiana" subject to certain exceptions, which exceptions do not include post-conviction proceedings).

Newspaper articles are by their very nature hearsay and, for that reason, are seldom proper evidence to prove any fact except the bare fact of their publication. Powers v. Gastineau, 568 N.E.2d 1020, 1026 (Ind. Ct. App. 1991), trans. denied. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted. Evid. R. 801(c). Biederstadt sought to introduce the newspaper article for the truth of the matter asserted therein, namely that the showing of the crime scene videotape caused visible and/or audible distress to several persons who witnessed it and, therefore, he was prejudiced by its showing. He fails to argue that the newspaper article fell within any exception to the hearsay rule. The post-conviction court did not abuse its discretion in refusing to allow the article into evidence.

C. Alleged Prosecutorial Misconduct

Biederstadt also argues that trial counsel was ineffective for failing to object to portions of the prosecutor's closing argument wherein she allegedly improperly vouched for the credibility of some of the State's witnesses. Biederstadt takes particular issue with the prosecutor's argument concerning the testimony of Cleo Luper, in which she stated:

> He [Luper] missed some details in there, there's no question about that. But what he saw about what counted was true, and that never changed. When Defense Counsel interviewed him in August or in December, when he gave his original statement in August and today, it never changed. And what

> he saw about Frank Biederstadt hitting the victim with the cement block, it never changed, and Defense Counsel cannot point to one time when it ever did.

App. p. 511.

Generally, a prosecuting attorney may comment upon witness credibility during closing argument as long as the assertion is based upon reasons that arise from the evidence. Vertner v. State, 793 N.E.2d 1148, 1153 (Ind. Ct. App. 2003). By contrast, it is improper for the prosecutor during trial to state a personal opinion as to the credibility of a witness. Id. A prosecutor's final argument may state and discuss the evidence and reasonable inferences derivable therefrom, as long as the prosecutor does not imply that he or she has personal knowledge regarding the case that is outside the record. Warren v. State, 725 N.E.2d 828, 834 (Ind. 2000).

The prosecutor's statement that Luper's testimony was "true" comes dangerously close to improper personal vouching for his credibility. In context, though, it is clear that she merely was reciting the evidence presented at trial and why it supported a finding that Biederstadt hit Buchanan with the cement block. There was no implication that the prosecutor had personal knowledge of the case that supported Luper's credibility; instead, she directed the jury to evidence in the record. Additionally, the allegedly objectionable argument by the prosecutor came in rebuttal, after defense counsel had lambasted the credibility of the State's witnesses, including Luper. The prosecutor appropriately was attempting to rehabilitate that credibility. Under these circumstances, we do not think trial counsel's failure to raise an objection to one possibly improper comment constituted ineffective assistance of counsel.

D. Defense Strategy

We now address Biederstadt's multi-faceted claim that trial counsel failed to prepare adequately for trial, failed to call key witnesses, and failed to advance an adequate defense on his behalf. We apply a great deal of deference to the judgment of counsel when reviewing a claim of ineffective assistance of counsel for failure to investigate or prepare for trial. Parish v. State, 838 N.E.2d 495, 500 (Ind. Ct. App. 2005). Counsel is effective in this regard if reasonable, thorough investigation is made, or if reasonable professional judgment supports limitations on the extent of investigation. Id. (quoting Strickland, 466 U.S. at 690-91, 104 S. Ct. at 2066). Likewise, a decision regarding what witnesses to call generally is a matter of trial strategy that an appellate court will not second-guess, although a failure to call a useful witness may constitute deficient performance. Brown v. State, 691 N.E.2d 438, 447 (Ind. 1998). A defendant claiming ineffective assistance of counsel based on failure to call useful witnesses bears the burden of demonstrating such usefulness. See Lee v. State, 694 N.E.2d 719, 722 (Ind. 1998), cert. denied, 525 U.S. 1023, 119 S. Ct. 554 (1998).

At the outset, we note that Biederstadt does not challenge the accuracy of the following finding made by the post-conviction court:

> [T]he Court finds that trial counsel's performance included: consulting with Petitioner, reviewing the State's discovery, developing a theory of defense, hiring an investigator and conducting an investigation to support that theory, cross-examining and impeaching the State's witnesses, objecting to the admission of the State's evidence, arguing the case to the jury, requesting a jury instruction, and filing a motion to correct error.

App. p. 197. Biederstadt also concedes that trial counsel "did a relatively credible job of pre-trial investigation . . . ." Appellant's Br. p. 25.

Nevertheless, Biederstadt claims that that investigation should have led trial counsel to call Phoebe Navarro, Joe Navarro, and Art Malone as trial witnesses because they purportedly would have stated that other individuals, namely Luper and Joe Navarro, had admitted to striking Buchanan in the head with a cement block. Assuming without deciding that such testimony would have been admissible, there is no evidence from any witness who would have testified that Biederstadt did not repeatedly strike Buchanan with the cement block, even if there were witnesses who might have testified that others also had struck him with a cement block. As trial counsel stated during the PCR hearing, "If there would have been a witness that said somebody else did it and you didn't and I knew about it, I'll guarantee it, they . . . would have been called to trial." App. p. 253 (emphasis added). Biederstadt fails to present any evidence of a witness who would have testified at trial that he was not involved in Buchanan's death.

In fact, we obliquely addressed this issue on direct appeal in affirming the denial of Biederstadt's motion to correct error. That motion alleged that one James McIntosh had told trial counsel after trial that he had heard that Luper and Navarro both had struck Buchanan with a cement block. We concluded that this allegedly new evidence "would probably not produce a different result upon retrial because it does not contradict the evidence presented at trial that Biederstadt repeatedly hit Buchanan on the head with the cement block. At most, the new evidence merely shows that two other people also hit Buchanan with the cement block." Biederstadt, slip op. at 5. In sum, Biederstadt has not

met his burden of demonstrating that he was prejudiced by trial counsel's failure to call these witnesses at trial because he has not definitively demonstrated their usefulness.

Regarding trial counsel's failure to call witnesses, Biederstadt also attacks the post-conviction court's refusal to issue a subpoena for one Timothy Parr. Indiana Post-Conviction Rule 1(9)(b) provides in part:

> If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness' testimony is required and the substance of the witness' expected testimony. If the court finds the witness' testimony would be relevant and probative, the court shall order that the subpoena be issued. If the court finds the proposed witness' testimony is not relevant and probative, it shall enter a finding on the record and refuse to issue the subpoena.

A post-conviction court's refusal to issue a subpoena is reviewed for an abuse of discretion, which occurs if the court's decision is against the logic and effect of the facts and circumstances before the court. Allen v. State, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003), trans. denied.

On appeal, Biederstadt claims that Parr originally was slated to testify on Biederstadt's behalf as a character witness, but that trial counsel told Parr that he "needn't bother [testifying]. Besides, Frank is finished anyway." Appellant's Br. p. 35. Biederstadt claims such testimony from Parr would have been relevant at the post-conviction hearing by demonstrating that trial counsel gave up on Biederstadt and, therefore, provided ineffective assistance of counsel. We disagree. That counsel might have harbored or expressed doubts about Biederstadt's chances of acquittal does not by itself mean that counsel provided ineffective assistance. We reiterate that the

performance of counsel is measured by the standard of objective reasonableness. See Grinstead, 845 N.E.2d at 1031. Counsel's performance is measured by the steps he took (or did not take) to defend Biederstadt, not by counsel's subjective assessment of the strength of Biederstadt's case. The post-conviction court did not abuse its discretion in refusing to issue the subpoena and concluding that Parr's expected testimony would not be relevant and probative to assessing the effectiveness of trial counsel's performance.

Biederstadt also contends that trial counsel was ineffective for not pursuing an intoxication defense. At the time of Biederstadt's trial, there was a limited statutory defense based on voluntary intoxication.[3] Former Indiana Code Section 35-41-3-5(b) stated, "Voluntary intoxication is a defense only to the extent that it negates an element of an offense referred to by the phrase 'with intent to' or 'with an intention to'.".[4] The premise of the statutory voluntary intoxication defense was that intoxication can be so severe as to render a person incapable of forming or entertaining the criminal intent required to commit a crime, yet not so severe as to render such person incapable of the conduct required to commit the crime. Street v. State, 567 N.E.2d 102, 104 (Ind. 1991).

Trial counsel stated during the PCR hearing that he did not pursue an intoxication defense because, in his experience, "nobody ever buys an intoxication defense in a murder case." Tr. p. 25. Furthermore, there was clearly evidence here that Biederstadt could form the intent to kill Buchanan. The State's witnesses, whose testimony had to be

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[3] Biederstadt does not assert that he was involuntarily intoxicated at the time of Buchanan's murder.

[4] In 1997, the statutory voluntary intoxication defense was deleted.

believed by the jury in order to convict Biederstadt, related that Biederstadt said it was necessary to kill Buchanan so that he would not "snitch," and that while striking Buchanan with the cement block he said, "Die, you S.O.B." In light of this clear evidence of Biederstadt's intention to kill Buchanan, as well as trial counsel's experience regarding the weakness generally of the intoxication defense in murder cases, it was a reasonable strategic decision not to pursue that defense.

Biederstadt also attacks the manner in which trial counsel attempted to impeach the State's witnesses. The record reveals, however, that trial counsel confronted the State's two primary witnesses, Cleo Luper and James Hawkins, multiple times with inconsistencies between their trial testimony and pre-trial statements; trial counsel also pointed out inconsistencies between Luper and Hawkins' testimony to the jury. This constituted effective advocacy.

Biederstadt contends that trial counsel should have requested specific jury instructions regarding Luper's prior conviction for armed robbery and Hawkins' alleged role as an accomplice in Buchanan's death and how the jury could consider those facts in assessing Luper and Hawkins' credibility. However, Biederstadt does not dispute that the jury was given general instructions regarding witness credibility; thus, the trial court would not have been required to give more detailed and specific witness credibility instructions even if they had been requested. See Chambers v. State, 734 N.E.2d 578, 581 (Ind. 2000) (holding trial court did not err in refusing to give jury instruction specifically discussing witness credibility and prior inconsistent statements where the jury was given general instructions regarding witness credibility). That being the case,

we cannot say trial counsel was ineffective for not requesting specific jury instructions regarding prior convictions or accomplice testimony.

Finally, we address Biederstadt's complaint that trial counsel was ineffective because he presented no case-in-chief on Biederstadt's behalf, but instead focused solely on attacking the strength of the State's case. Our supreme court has held that choosing to put the State to its burden and not present a defense may be a legitimate trial strategy, just like other strategic decisions. Rondon, 711 N.E.2d at 520. Here, we have already concluded that trial counsel was not ineffective for failing to seek a voluntary manslaughter instruction, for not calling certain witnesses on Biederstadt's behalf, and for not pursuing an intoxication defense. Counsel conducted independent pre-trial investigation, looking for exculpatory evidence, but never found any witness who could contradict Luper and Hawkins and state that Biederstadt had not repeatedly struck Buchanan with the cement block. Finding no clearly exculpatory evidence, counsel focused on what he perceived to be the State's greatest weakness, the inconsistent statements and testimony given by Luper and Hawkins. Under the circumstances, we cannot say trial counsel was ineffective for choosing not to present a defense separate from putting the State to its burden and challenging the credibility of its witnesses.

E. Appellate counsel

We briefly address Biederstadt's contention that he also received ineffective assistance of appellate counsel, in addition to ineffective assistance of trial counsel. First, he argues that appellate counsel was ineffective for not raising the effectiveness of trial counsel as an issue on direct appeal. However, it is well-settled that the ineffectiveness

of trial counsel need not be raised on direct appeal and may be raised for the first time in a petition for post-conviction relief. See Woods v. State, 701 N.E.2d 1208, 1210 (Ind. 1998). Biederstadt's claim of ineffective assistance of trial counsel was properly presented and fully addressed in this PCR proceeding. He has not shown how he was prejudiced by appellate counsel not having raised the issue on direct appeal.

Biederstadt also claims appellate counsel should have raised the voluntary manslaughter instruction issue on direct appeal. To have made such a claim on direct appeal, where no such instruction had been requested at trial, appellate counsel would have had to have argued that the failure to give such an instruction constituted fundamental error. See Conner, 829 N.E.2d at 24-25. In that regard, our supreme court expressly has held, "failure to give instructions on lesser-included offenses does not constitute fundamental error." Metcalf v. State, 451 N.E.2d 321, 326 (Ind. 1983). Thus, it is clear that any instructional error claim on direct appeal would have failed and, therefore, appellate counsel was not ineffective for not making such a claim.[5]

[5] To the extent Biederstadt may also make a freestanding claim that it was erroneous not to instruct the jury on the elements of voluntary manslaughter, such a claim is not properly presented in a PCR proceeding. See Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) (holding, "In post-conviction proceedings, complaints that something went awry at trial are generally cognizable only when they show deprivation of the right to effective counsel or issues demonstrably unavailable at the time of trial or direct appeal.").

Conclusion

Biederstadt did not meet his burden of establishing that he received ineffective assistance of trial or appellate counsel. The post-conviction court properly denied his PCR petition. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.